United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 734

STEVE ANDERSON, EARL TROMBLEY, LILLIAN SOCIA, ALBERT WATKINS, ARTHUR SIBBE, NELSON LUCHTMAN, RITA SCHULTE, individually, for and in behalf of themselves and others similarly situated; and LOCAL NO. 1083, UNITED POTTERY WORKERS of AMERICA, affiliated with the Congress of Industrial Organizations, Mt. Clemens, Michigan,

Petitioners,

vs.

MT. CLEMENS POTTERY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit

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United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 342

STEVE ANDERSON, EARL TROMBLEY, LILLIAN SOCIA, ALBERT WATKINS, ARTHUR SIBBE, NELSON LUCHTMAN, RITA SCHULTE, individually, for and in behalf of themselves and others similarly situated; and LOCAL NO. 1083, UNITED POTTERY WORKERS of AMERICA, affiliated with the Congress of Industrial Organizations, Mt. Clemens Michigan,

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the decree of the Circuit Court of Appeals for the Sixth Circuit, entered on May 21, 1945, reversing, with directions, the decree of the District Court of the United States for the Eastern District of Michigan, entered June 13, 1944.

OPINION BELOW

The opinion of the court below filed May 21, 1945, is printed in the Transcript of Record herein and appears on pages 1587 to 1597.

BASIS OF JURISDICTION

Jurisdiction is invoked under the provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 1063, 29 U. S. C., Sec. 207 (a). Application for stay of mandate pending application in this court for writ of certiorari was made on or about June 18, 1945. Order staying said mandate for thirty days or until final disposition by the United States Supreme Court was entered on August 13, 1945.

QUESTIONS PRESENTED

The fundamental question presented in this petition is whether a circuit court of appeals having before it findings of fact, conclusions of law and judgment of the district court to the effect that employees should be paid for work performed according to their time clock records, less seven minutes travel time in the morning, and five minutes travel time at the resumption of work after the lunch period, may on the record herein, reverse said judgment and deny said employees compensation for said work time.

Petitioners herein filed their action under the Fair Labor Standards Act of 1938, Sec. 7 (a), which provides that employees shall receive compensation at the rate of

one and one-half times the regular rate at which they are employed for hours worked in excess of the statutory number set forth therein. Petitioners state that the District Court found specifically herein (Transcript of Record, page 288) that the "defendant company, through its foreman, had sought to circumvent the Fair Labor Standards Act." The petitioning employees were required to report and proceed to work as much as 30 minutes a day for which they were not compensated. The District Court stated (Transcript of Record, page 288) as follows:

> "1. Plaintiff employees contended in effect that they were required to report for work approximately fourteen minutes before the hour in the morning and that they immediately started productive work and were paid only from the subsequent quarter hour. The employees further contended that this process of requiring them to work fourteen minutes after the hour was repeated at lunch recess, without payment except from the hour. After reviewing the record of the evidence adduced, the Court is convinced that plaintiff employees were in fact required by the foremen of the defendant as we stated in our earlier opinion that"
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> "when they (foremen) told them (employees) that work would start at 6:45 o'clock, they likewise mentioned the hour of 6:31; or if 7:00 A. M. was the starting time, then 6:46 was also designated in some manner. With this picture before us we cannot help but believe that there was a method in this formula beyond that expressed by defendant's witnesses."

The District Court personally examined exhibits and witnesses and then reviewed and re-reviewed the testimony, (Transcript of Record, page 287), but the Circuit Court of Appeals reversed the Findings of Fact, Conclusions of Law, as found by the District Court and upheld

the Special Master's findings and dismissed the petition. Petitioners state that the findings of the Circuit Court of Appeals herein, in refusing the employees compensation for the working time spent upon the employer's premises, is directly in conflict with the ruling of the United States Supreme Court in the case of *Tennessee Coal and Iron Company v. Muscoda*, 321 U. S. 590, and in the case of *Jewell Ridge Coal Company v. Local No. 6167, United Mine Workers of America, No. 721*, decided by the United States Supreme Court May 7, 1945.

SUMMARY STATEMENT

The essential facts are contained in the Bill of Complaint and the Answer. The action herein was brought under the provisions of the Fair Labor Standards Act, and was instituted by seven employees and by Local No. 1083, United Pottery Workers of America, affiliated with the Congress of Industrial Organization of Mt. Clemens, Michigan. More than 300 employees filed written, specific designations authorizing the prosecution of this action on their behalf. Most of the employees were piece-workers engaged in the manufacture of pottery products for shipment in interstate commerce. Innumerable motions were filed by the defendant company, and finally a Special Master was designated to take the testimony for the benefit of the District Court. Approximately 3500 printed pages of testimony were offered and the Special Master made his report to the Honorable Frank A. Picard, District Judge, on March 23, 1943 (Transcript of Record, page 143). The District Court, after many hearings, wrote its first opinion on July 2, 1943 (Transcript of Record, page 239) and submitted and adopted Findings of Fact on September 13, 1943 (Transcript of Record, page 272). The

court wrote an additional opinion which was filed on March 3, 1944 (Transcript of Record, page 287). A judgment for the plaintiff employees was filed on June 13, 1944 (Transcript of Record, page 297). The District Court in said judgment granted the employees who were before said court a judgment for

> "all unpaid time over seven minutes before the starting hour in the morning, and over five minutes before the hour set for beginning of the afternoon work. No deduction therefrom shall be made by the defendant for bonuses or so-called extra compensation which the Court herein discussed in its opinion of March 3, 1944, and found to be gratuities, gifts and extra compensation voluntarily paid by defendant to the plaintiff employees. Upon such determination of the time worked by said employees, the defendant shall pay said employees for all hours in which they were so employed at the rate of time and one-half times their regular rate for the time spent in excess of the prescribed hours established by the Fair Labor Standards Act of 1938, and the defendant shall pay to said plaintiffs and other employees having duly filed their authorizations herein, an amount equal thereto as liquidated damages, as provided for in said Act" (Transcript of Record, page 298).

The employees substantiated their working hours by the time clock cards which were the only records maintained by the company, recording the working time. The company herein had the unusual and unfair method of computing working time of employees from the subsequent quarter hour after the employees checked in for work, and from the prior quarter hour when they checked out. The testimony revealed that preparation for productive work, such as changing clothes, collecting tools and taking care of their personal needs was all undertaken by the employees prior to checking through the time clock. The evidence also revealed that it took between one minute and

two minutes from the time when the employees checked through the time clock cards to the time when they undertook productive labors. The employer assigned work benches to the employees in various parts of the plant.

The petitioners contend that there is little factual or legal difference between this case and the *Tennessee Coal and Iron Company* and the *Jewell Ridge Coal Company* cases, *supra*, heretofore decided by the United States Supreme Court. The contention of the petitioning employees is that they should be paid by the time clock cards as maintained by the employer. The travel time between the time clocks and their work benches as well as all other activities after punching the time clocks bears all the indicia of work as described in said decisions of the United States Supreme Court, and more particularly labeled as follows. There was present:

1. Physical and mental exertion expended by the employees on the employer's premises.
2. Said exertion was controlled or required by the employer.
3. Such exertion was pursued necessarily and primarily for the benefit of the employer and his business.

As the District Court below found, the defendant company required its employees to report for work at 14 minutes to 7:00 o'clock in the morning, starting them practically immediately, and yet computed their hours from 7:00 o'clock continuing this practice throughout the day as above enumerated, so that, in fact, the employees worked approximately 56 minutes every day which was not computed in figuring overtime. (Transcript of Record, page 240.)

The District Court below found, furthermore, as a fact, that a vast majority of the employees had checked through the time clocks more than 10 minutes prior to 7:00 o'clock, and "by 8 minutes to 7:00 but a few stragglers were left." (Transcript of Record, page 242.) The Special Master did not discuss this latter fact in his report, and the District Court's Opinion and Finding of Fact is the only finding of fact on that point. Petitioners state that the Circuit Court of Appeals for the Sixth Circuit took no evidence thereon and did not find that said finding of fact was erroneous, but nevertheless reversed said District Court.

Although the United States Supreme Court has found that employees performing such productive labors are to be paid for the entire work week, the Circuit Court below in the instant case apparently decided the exact opposite, the court holding that an employer could require his employees to report on the premises and undertake productive labors at any time, disregarding time clock records and then pay said employees only for an arbitrary, "starting time" which began a considerable time after actual productive labors were undertaken.

While it is the contention of the petitioners that this case is not unlike the *Tennessee Coal and Iron Company* and the *Jewell Ridge Coal Company* cases, *supra*, we respectfully point out that the trial court herein, in its decision of March 5, 1944, (Page 287, Transcript of Record) did not base its judgment for the plaintiffs upon a ruling that the time spent by the employees in checking through the time clocks or in going to their work places was strictly working time. Instead the District Court indicated *that time spent in these activities should be credited to the employer and deducted from the time shown on the time cards.* The Circuit Court of Appeals for the Sixth Circuit, however, in treating this case as an ordinary travel

time case, misconstrued the District Court's decision and adoption of a formula crediting the employer with certain work time as shown by the employees' time cards.

We have, therefore, a case in which the question presented is one which has been expressly reserved by the United States Supreme Court in the *Tennessee Coal and Iron Company* and the *Jewell Ridge Coal Company* cases, *supra*. In the former it was stated, "This does not foreclose, of course, reasonable provisions of contract or custom governing the computation of work hours where precisely accurate computation is difficult or impossible" and in the latter case, "Nor do we make any intimation at this time concerning the validity of agreements whereby, in a *bona fide* attempt to avoid complex difficulties of computation, travel time is averaged or fixed at an arbitrary figure and underground miners are paid on that basis rather than according to their individual travel time." The District Court, after extensively examining the evidence and exhibits did, in fact, adopt a formula described by the Circuit Court as "arbitrary" (Page 1594, Transcript) of crediting the employer with certain minutes of the employees' work time. The Circuit Court in this case actually characterized an award for hours worked minus travel time roughly computed as a "judgment based upon surmise and conjecture which cannot be sustained" (Transcript of Record, page 1596).

Petitioning employees throughout these proceedings have argued that because of the impossibility of calculating travel time to the exact second the reviewing court should compel a modification of the trial court's decision by cancellation of the deduction given the employer herein. Petitioning employees sought instead an order that the employees be given full recovery from the employer for the amounts shown on the time cards. The employer

is required by Section 11(c) of the Act and the Regulations thereunder to maintain records of the hours worked by the employees. The company records show hours worked for which the employees were not in fact paid. The District Court found that part of the time shown by the records for which the employees were not in fact paid was spent in productive work on the job (Trans. of Record, page 242). Under these circumstances it would seem elementary that the employer must carry the burden of showing wherein its records were erroneous because of the inclusion of time therein which ought not be considered working time. Because of the Circuit Court's mention of the *Tennessee Coal and Iron Company* case we respectfully call attention to the fact that the Circuit Court misconceived the District Court's decision herein and erroneously treated the trial court's formula as allowing pay for travel time, whereas it was in fact an effort to credit the employed with working time of the employees.

Thus, the decision of the Circuit Court for the Sixth Circuit, reversing the District Court below and interpreting an important statute of the United States, leaves the law as to working time in our industrial plants in a state of uncertainty, and the determination of this question by this Court will settle this extremely important point of law and remove the uncertainty and make for uniformity of decisions as to rights of employees under the Fair Labor Standards Act of 1938. That said decision of the Circuit Court of Appeals for the Sixth Circuit is in conflict with applicable decisions of this Court and it is submitted that said Circuit Court has so far departed from the usual course of judicial proceedings as to require review by this Court.

Wherefore, it is respectfully submitted that this Petition for Writ of Certiorari to review the judgment of the

Circuit Court of Appeals for the Sixth Circuit, should be granted.

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Of Counsel:
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Toledo, Ohio.

NOTICE OF FILING PETITION FOR REVIEW

To: Frank E. Cooper,
Beaumont, Smith & Harris,
and
Bert V. Kuimeley,
Attorneys for Respondent.

You are hereby notified that on the 20th day of August, 1945, the petitioners, Steve Anderson, Earl Trombley, Lillian Socia, Albert Watkins, Arthur Sibbe, Nelson Luchtman, Rita Schulte, individually, for and in behalf of themselves and others similarly situated; and Local No. 1083, United Pottery Workers of America, Affiliated with the Congress of Industrial Organizations, Mt. Clemens, Michigan, filed in the Supreme Court of the United States a petition for review on Writ of Certiorari of the decision of the Circuit Court of Appeals in the case in that court in which petitioners are appellees, and respondent is appellant, being cause No. 9924 on the docket of said court.

Copy of petition, of the printed record in said cause, and of the brief and statement in support of said petition are annexed hereto and are hereby served upon you.

LEE PRESSMAN,
Attorney for Petitioners.

Of Counsel:
EDWARD LAMB.